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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KARLA MARICELA PALACIO SEPULVEDA, Defendant.	Criminal Case No. 07-CR-3394 IEG Date: April 28, 2008 Time: 2:00 p.m. **PLAINTIFF UNITED STATES' MOTIONS IN LIMINE TO:** **(A) EXCLUDE ALL WITNESSES EXCEPT CASE AGENT;** **(B) PROHIBIT REFERENCE TO PUNISHMENT, ETC.;** **(C) PRECLUDE SELF-SERVING HEARSAY;** **(D) LIMIT CHARACTER EVIDENCE;** **(E) PRECLUDE EVIDENCE OF DURESS AND NECESSITY;** **(F) ADMIT EXPERT TESTIMONY BY THE UNITED STATES;** **(G) PRECLUDE EXPERT TESTIMONY BY DEFENSE;** **(H) ADMIT "404(B)" EVIDENCE; AND** **(I) ADMIT DEMEANOR EVIDENCE - OR LACK THEREOF** **(J) ALLOW REBUTTAL EXPERT TESTIMONY** **TOGETHER WITH STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES**

COMES NOW, the plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Stewart M. Young, Assistant United States Attorney, and hereby files its Motions in Limine. These Motions are based upon the files and records of the case together with the attached statement of facts and memorandum of points and authorities.

I

STATEMENT OF THE CASE

On December 18, 2007, a federal grand jury in the Southern District of California returned a two-count Indictment charging defendant Karla Maricela Palacio Sepulveda ("Defendant") with importing approximately 38.62 kilograms (84.96 pounds) of marijuana into the United States in violation of Title 21, United States Code, §§ 952 and 960; and possessing that marijuana with the intent to distribute, in violation of Title 21, United States Code, § 841(a)(1). Defendant was arraigned on the Indictment on December 18, 2007, and pleaded not guilty.

II

STATEMENT OF FACTS

A. PRIMARY INSPECTION

On December 5, 2007, at approximately 3:56 p.m., Defendant entered the Calexico West, California Port of Entry ("POE") as the driver and sole occupant of a 1996 Pontiac Bonneville, bearing Baja/Mexico license plate number BCU3214. At primary inspection, Customs and Border Protection ("CBP") Officer Alexandro Felix contacted the Defendant, who was identified by her Border Crossing Card. Defendant gave a negative declaration and stated that she had owned the vehicle for one year. She stated that she was heading toward Calexico, California. While speaking to Defendant, CBP Officer Felix did not notice any signs of nervousness, but he did smell what appeared to be soap and marijuana around the area of the glove compartment. He referred the vehicle to secondary for further inspection.

B. SECONDARY INSPECTION

In secondary inspection, CBP Officer Carmen Estrada contacted Defendant and received a negative declaration. Defendant stated to Officer Estrada that she was heading to Calexico, California, to buy some shoes. She further stated that after buying shoes, she would drive to Heber, California to visit her aunt. While speaking with Defendant, Officer Estrada did not observe any signs of nervousness, but did notice shiny packages behind the glove compartment and the inside of the dashboard. Officer Estrada detained Defendant in the vehicle secondary office.

CBP officers then removed 21 packages from a compartment located inside the dashboard of the vehicle. One of the packages was probed and field-tested positive for marijuana. A total of 21 packages were removed with an aggregate weight of 38.62 kilograms.

C. CHEMICAL EVALUATION OF THE DRUGS SEIZED

A forensic chemist employed by the Drug Enforcement Administration and assigned to the Southwest Regional Laboratory in this district conducted a series of evaluations on the seized drugs and concluded that the substance tested positive for marijuana.

D. RELATED EVENT

On May 4, 2005, Oscar Herrera-Martinez applied for admission to the Calexico West, California Port of Entry driving a 1989 Dodge Grand Caravan bearing Baja Mexico license plate number BCT4879. Herrera stated at primary that the vehicle belonged to his female cousin "Karla Palacio Sepulveda." CBP Officer Garcia viewed the registration of this vehicle, and saw that it listed "Karla Maricela Palacio Sepulveda" as the owner. Upon noticing that the gas tank sounded solid, a pproximately 29.26 kilograms of marijuana were found concealed in the gas tank of that vehicle.

Herrera-Martinez and his passenger, Alberto Aguilara-Garcia, both pleaded guilty to an information charging them with importation of marijuana and aiding and abetting. They were sentenced to 6 months custody and 2 years supervised release by Judge Gordon Thompson in Case No. 05-CR-956-GT.

Discovery as to this event was produced to defendant on April 21, 2008. The Government noted to Defendant on April 22, 2008, that it intended to introduce this evidence to demonstrate knowledge, absence of accident or mistake on the part of Defendant.

III

POINTS AND AUTHORITIES

A. THE COURT SHOULD EXCLUDE WITNESSES DURING TRIAL WITH THE EXCEPTION OF THE UNITED STATES' CASE AGENT

Under Federal Rules of Evidence, Rule 615, "a person whose presence is shown by a party to be essential to the presentation of the party's cause" should not be ordered excluded from the court during trial. The case agent in this matter, ICE Special Agent Lonnie Brasby, has been critical in moving this case forward to this point and is considered by the United States to be an integral part of the trial team. As such, the case agent's presence at trial is necessary to the United States. Further, the United States requests that Defendant's testifying witnesses be excluded during trial pursuant to Rule 615.

B. THE COURT SHOULD PROHIBIT REFERENCE TO DEFENDANT'S HEALTH, AGE, FINANCES, EDUCATION AND POTENTIAL PUNISHMENT

Evidence of, and thus argument referring to, the Defendant's health, age, finances, education and potential punishment is not relevant for the purpose of determining a defendant's guilt or innocense at trial. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. Federal Rules of Evidence, Rule 403 provides further that even relevant evidence may be inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." Further, the Ninth Circuit Model Jury Instructions explicitly instruct jurors to "not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy." § 3.1 (2003 Edition, West Publishing Co.).

Moreover, it is inappropriate for a jury to be informed of the consequences of their verdict. United States v. Frank, 956 F.2d 872, 879 (9th Cir. 1991), cert. denied, 506 U.S. 932 (1992). Any mention of penalty or felony status is irrelevant as it sheds no light on Defendant's guilt or innocence. Therefore, the United States respectfully requests that this Court prohibit any reference to punishment at any point in this trial.

Reference to Defendant's health, age, finances, education and potential punishment may be relevant at sentencing. However, in a drug smuggling trial, such reference is not only irrelevant and unfairly prejudicial, but a blatant play for sympathy and jury nullification as well.

C. SELF-SERVING HEARSAY IS INADMISSIBLE

Defendant's out of court statements are inadmissible hearsay when offered by the Defendant through witnesses. Defendant cannot rely on Federal Rules of Evidence, Rule 801(d)(2), because he is not the proponent of the evidence, and the evidence is not being offered against him. Defendant cannot attempt to have "self-serving hearsay" brought before the jury without the benefit of cross-examination. See, e.g., United States v. Ortega, 203 F.3d 675, 679 (9th Cir. 2000); United States v. Fernandez, 839 F.2d 639, 640 (9th Cir. 1988). In this case, the United States anticipates that

Defendant may attempt to have the United States' witnesses testify about certain statements which Defendant made to government agents or to defense witnesses. Thus, the United States moves, in limine, to prohibit Defendant from eliciting self-serving hearsay from: (a) the United States' witnesses or (b) defense witnesses.

D. THE COURT SHOULD LIMIT CHARACTER EVIDENCE

The United States anticipates that Defendant may improperly attempt to introduce testimony regarding Defendant's specific acts of prior good conduct. Testimony as to multiple instances of good conduct violates Federal Rules of Evidence, Rule 405(a). United States v. Barry, 841 F.2d 1400, 1403 (9th Cir. 1987); Government of Virgin Islands v. Grant, 775 F.2d 508, 512 (3d Cir. 1985). Further, Federal Rules of Evidence, Rule 404(a)(1), states that evidence of a person's character is not admissible for the purpose of proving a person's actions on a particular occasion except "evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same."

A character witness can not offer specific instances of conduct by the defendant which would tend to support the reputation of the defendant. United States v. Giese, 597 F.2d 1170 (9th Cir. 1979) cert. denied, 444 U.S. 972 (1979) (character witnesses must restrict their direct testimony to appraisals of defendant's reputation); United States v. Hedgecorth, 873 F.2d 1307 (9th Cir. 1989) ("While a defendant may show a characteristic for lawfulness through opinion or reputation testimony, evidence of specific acts is generally inadmissible").

In interpreting the permissible scope of character evidence under Rule 404(a), the Ninth Circuit has ruled that presentation of witnesses to testify about a defendant's character for "law abidingness" and honesty is permissible. However, asking a defense witness about a defendant's propensity to engage in a specific type of criminal activity is not allowed under Rule 404(a). See United States v. Diaz, 961 F.2d 1417 (9th Cir. 1992) (impermissible to ask character witness about defendant's propensity to engage in large scale drug dealing).

Thus, the United States hereby moves in limine to prohibit Defendant from introducing testimony from any character witness about (a) a specific instance of Defendant's conduct, and (b) Defendant's propensity to be involved in drug smuggling.

E. THE COURT SHOULD PRECLUDE EVIDENCE OF DURESS AND NECESSITY

A pretrial motion is an appropriate means of testing the sufficiency of a proffered defense and precluding evidence thereof if the defense is found to be insufficient. Fed. R. Crim. P. 12(b) ("Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion."); United States v. Peltier, 693 F.2d 96, 97-98 (9th Cir. 1982) (per curiam); United States v. Shapiro, 669 F.2d 593, 596-97 (9th Cir. 1982); see also Fed. R. Crim. P. 12(e).

Generally, motions are capable of pretrial determination if they raise issues of law, rather than issues of fact. United States v. Shortt Accountancy Corporation, 785 F.2d 1448, 1452 (9th Cir. 1986). Courts have specifically approved the pretrial exclusion of evidence relating to a legally insufficient duress defense on numerous occasions. See United States v. Bailey, 444 U.S. 394 (1980) (addressing duress); United States v. Moreno, 102 F.3d 994, 997 (9th Cir. 1996), cert. denied, 118 S. Ct. 86 (1997) (addressing duress). Similarly, a district court may preclude a necessity defense where "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1992).

In order to rely on a defense of duress, a defendant must establish a prima facie case that:

(1) defendant committed the crime charged because of an immediate threat of death or serious bodily harm;

(2) defendant had a well-grounded fear that the threat would be carried out; and

(3) there was no reasonable opportunity to escape the threatened harm.

United States v. Bailey, 444 U.S. 394, 410-11 (1980); Moreno, 102 F.3d at 997. If Defendant fails to make a threshold showing as to each and every element of the defense, defense counsel should not burden the jury with comments relating to such a defense. See, e.g., Bailey, 444 U.S. at 416.

A defendant must establish the existence of four elements to be entitled to a necessity defense:

(1) that he was faced with a choice of evils and chose the lesser evil;

(2) that he acted to prevent imminent harm;

(3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and

(4) that there was no other legal alternatives to violating the law.

See Schoon, 971 F.2d at 195; United States v. Dorrell, 758 F.2d 427, 430-31 (9th Cir. 1985). A court may preclude invocation of the defense if "proof is deficient with regard to any of the four elements." See Schoon, 971 F.2d at 195.

The United States hereby moves to preclude defense counsel from making any comments during opening statement or the case-in-chief that relate to any purported defense of "duress" or "coercion" or "necessity" unless Defendant makes a prima facie showing satisfying each and every element of the defense. The United States respectfully requests that the Court rule on this issue prior to opening statements to avoid the prejudice, confusion, and invitation for jury nullification that would result from such comments.

F. EXPERT TESTIMONY FOR THE UNITED STATES SHOULD BE ADMITTED

1. Introduction

Absent a stipulation by Defendant, the United States intends to call Forensic Chemist Silvia Tarin-Brousseau from the Drug Enforcement Administration to testimony that the substance seized from Defendant's vehicle was marijuana. Additionally, the United States intends to call Special Agent Paul Lewenthal from United States Immigration and Customs Enforcement ("ICE") as an expert in narcotics trafficking and the value of illicit narcotics, namely marijuana. On April 21, 2008, Defendant was provided with the requisite notice regarding these experts and their *curriculum vitae*. As such, the United States moves to admit such testimony as relevant and reliable.

2. Standard of Admissibility

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. The trial judge is the gatekeeper regarding the type and scope of expert testimony that should be admitted in any particular trial, and has "broad latitude" in determining the relevance and reliability of such testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999).

Determining whether expert testimony would assist the trier-of-fact in understanding the facts in issue is within the sound discretion of the trial judge. United States v. Alonso, 48 F.3d 1536, 1539

(9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). The district court may consider the Daubert test or any other factors in addressing relevant reliability concerns regarding expert testimony. Kumho, 526 U.S. at 149-50 (noting that "there are many different kinds of experts, and many different kinds of expertise," including, "experts in drug terms, handwriting analysis, criminal modus operandi, ...").

The expert's opinion may be based on hearsay or facts not in evidence when the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703; see, e.g., United States v. Gil, 58 F.3d 1414, 1422 (9th Cir. 1995) (stating "[w]e have consistently held that government agents or similar persons may testify as to the general practices of criminals to establish the defendants' modus operandi.") (internal quotations omitted); see also United States v. Hankey, 203 F.3d 1160, 1168-70 (9th Cir. 2000) (affirming district court's admission of gang expert testimony that gang members would be subject to violent retribution if they testified against another gang member). An expert may provide opinion testimony even if the testimony embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704; United States v. Plunk, 153 F.3d 1011, 1018 (9th Cir. 1998). An experienced narcotics agent may testify in the form of an opinion even if that opinion is based in part on information from other agents familiar with the issue. United States v. Golden, 532 F.2d 1244, 1248 (9th Cir. 1976). The proposed expert testimony "alerts [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984).

3. Evidence Regarding Value of the Marijuana

The United States intends to offer the testimony of ICE Special Agent Lewenthal regarding the retail or "street" value and the wholesale value, both in the United States and Mexico, of the marijuana found concealed in Defendant's vehicle. As discussed below, the Ninth Circuit Court of Appeals has upheld the use of such expert testimony at trial.

In United States v. Ogbuehi, 18 F.3d 807, 812 (9th Cir. 1994), the defendant was charged with importation of heroin. At trial, the United States introduced expert testimony regarding the street value of the heroin, assuming the drugs had been repeatedly cut and sold on the street. The Ninth Circuit held that admission of such testimony was proper and that counsel can argue reasonable inferences from the evidence. Id. at 812; see also United States v. Savinovich, 845 F.2d 834, 838 (9th Cir. 1988) (price, quantity and quality of narcotics is relevant to demonstrate defendant's knowledge of the drugs and intent to distribute them); United States v. Kearney, 560 F.2d 1358, 1369 (9th Cir. 1977) (street value of narcotics relevant to demonstrate defendant's knowledge).

In this case, knowledge and intent are essential elements of the offenses charged. The testimony of ICE Special Agent Lewenthal regarding the value of the marijuana seized is strong circumstantial evidence that Defendant knew the marijuana was concealed in his vehicle on the day of her arrest and that she intended to further distribute the marijuana. Additionally, such evidence will also assist the jury's understanding of how crossing the international border impacts the value of the marijuana at issue in this case. Thus, the Court should admit this testimony.

4. 38.62 Kilograms of Marijuana is an Amount for Distribution

The United States further intends to introduce the testimony of ICE Special Agent Lewenthal for the purpose of proving that 38.62 kilograms of marijuana is an amount for distribution, not for personal use. As discussed above, such testimony is relevant to the issues of knowledge and intent to distribute. See Kinsey, 843 F.2d at 387-88. Further, it is particularly significant to the jury's understanding of the facts in this case because the amount of marijuana - although substantial - is small relative to many other newsworthy drug-importation cases. Accordingly, the Court should admit this testimony to enable the United States to prove essential elements of the charged offenses.

5. Expert Testimony that the Substance Seized is Marijuana

Again, absent a stipulation by Defendant, the United States intends to call Forensic Chemist Silvia Tarin-Brousseau from the Drug Enforcement Administration to testify that the substance seized from Defendant's vehicle is marijuana, a Schedule I controlled substance. The United States anticipates that she will testify that se performed various tests on the substance seized from Defendant's vehicle, and that these tests all indicated that the substance is in fact marijuana. Ms. Tarin-Brousseau will base this opinion on her background, education and experience, along with her knowledge and use of accepted scientific methods of testing. This testimony bears directly on an element of the charged offense - that marijuana is a prohibited drug.

G. THE COURT SHOULD PRECLUDE DEFENDANT FROM OFFERING EXPERT TESTIMONY

On January 17, 2008, the Government moved for reciprocal discovery. The Government requests the opportunity to view all exhibits and documents which Defendant intends to introduce as evidence in her case-in-chief at trial or which were prepared by a witness whom the Defendant intends to call at trial. Moreover, the United States requested disclosure by Defendant of written summaries of testimony that Defendant intends to rely upon under Rules 702, 703, or 705 of the Federal Rules of Evidence at trial. These summaries would include an expert witnesses' opinions, the bases and reasons for those opinions, and the expert witnesses' qualifications. To date, Defendant has provided neither notice of any expert witness, nor any reports by expert witnesses. Accordingly, the United States respectfully requests notice of such expert testimony, or requests that Defendant not be permitted to introduce any expert testimony.

If the Court determines that Defendant may introduce expert testimony, the United States requests a hearing to determine this expert's qualifications and relevance of the expert's testimony pursuant to Federal Rule of Evidence 702 and Kumho Tire Co., 526 U.S. at 150. See United States v. Rincon, 11 F.3d 922 (9th Cir. 1993) (affirming the district court's decision to not admit the defendant's proffered expert testimony because there had been no showing that the proposed testimony related to an area that was recognized as a science or that the proposed testimony would assist the jury in understanding the case); see also United States v. Hankey, 203 F.3d 1160, 1167 (9th Cir.), cert. denied, 530 U.S. 1268 (2000).

H. THE COURT SHOULD ADMIT "404(B)" EVIDENCE

The Government has provided Rule 404(b) notice to Defendant on April 22, 2008, regarding her prior act of being the registered owner of a vehicle found with 29.26 kilograms of marijuana on May 4, 2005. In theses notices and in discovery, the United States provided sufficient information to alert defense counsel to the general nature of the evidence to be offered at trial and thereby avoid surprise.

Evidence of other crimes, wrongs, or acts is not admissible under Rule 404(b) to prove the character of the defendant in order to show action in conformity therewith. However, evidence of other crimes, wrongs, or acts is admissible under Rule 404(b) so long as its introduction is for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Rule 404(b) is "an inclusionary rule" under which evidence is inadmissable "only when it proves nothing but the defendant's criminal propensities." United States v. Diggs, 649 F.2d 731, 737 (9th Cir.), cert denied, 454 U.S. 970 (1981), overruled on other grounds, United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824 (1984). Evidence of other acts is admissible under Rule 404(b) if:

(1) the evidence tends to prove a material element of the offense charged;

(2) the prior act is not too remote in time;

(3) the evidence is sufficient to support a finding that the defendant committed the other act; and

(4) (where knowledge and intent are at issue) the act is similar to the offense charged.

United States v. Plancarte-Alvarez, 366 F.3d 1058, 1062 (9th Cir. 2004) (citing United States v. Mayans, 17 F.3d 1174, 1181 (9th Cir. 1994)); United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir. 1993) (evaluating admissibility under Rule 404(b) for materiality, similarity, sufficiency, and temporal proximity).

A. Defendant Being the Registered Owner of 2005 Vehicle Is Material to the Elements of the Offense

Here, Defendant was the registered owner of a vehicle where marijuana was smuggled into the country. The registration documents for the vehicle demonstrated that defendant was that registered owner. Such a fact is material to the issue of whether she knowingly and intentionally imported marijuana into the United States from Mexico and knowingly possessed marijuana with the intent to distribute on this occasion. See United States v. Hodges, 770 F.2d 1475, 1479 (9th Cir. 1985) (other act evidence may be introduced if the Government establishes its relevance to an actual issue in the case). Indeed, the Ninth Circuit has upheld the admission of other act evidence to refute an "innocent dupe" defense. See United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991) (subsequent act of importing 30 pounds of marijuana was relevant to show defendant was not "duped" into initially smuggling cocaine into the United States), cert. denied, 501 U.S. 1234, 111 S.Ct. 2861 (1991).

B. Prior Act is Not too Remote in Time

Here, the "other act" evidence is not too remote in time. There is no bright-line rule requiring the Court to exclude other act evidence after a certain period of time has elapsed. See United States v. Brown, 880 F.2d 1012, 1015 n. 3 (9th Cir. 1989). Proximity in time "is not a prerequisite having independent force." United States v. Ramirez-Jimenez, 967 F.2d 1321, 1326 (9th Cir. 1992). It should be considered in the context of all the relevant facts and circumstances in a given case. Id.; see also United States v. Johnson, 132 F.3d 1279, 1283 (9th Cir. 1997) (upholding admission of "other act" that occurred 13 years before charged crime); and United States v. Ross, 886 F.2d 264, 267 (9th Cir. 1989) (same). As such, Defendant's act of being the registered owner of a vehicle stopped with 29 kilograms of marijuana in 2005 is sufficiently recent for the purposes of Rule 404(b).

C. There is Sufficient Evidence of Prior Act

Here, the United States will present sufficient evidence of Defendant's act of being the registered owner of the 2005 vehicle through the testimony of ICE Special Agent John Kapitzke. Agent Kapitzke investigated the 2005 case and viewed documents associated with the vehicle. He also conducted the interviews of the defendants associated with that vehicle load (those post-Miranda statements will not be presented due to Government's acquaintance with United States v. Crawford). Other act evidence under Rule 404(b) should be admitted if "there is sufficient evidence to support a finding by the jury that the defendant committed the similar act." Huddleston v. United States, 485 U.S. 681, 685 (1988). The testimony of a single witness is sufficient to satisfy the low-threshold for purposes of Rule 404(b). See United States v. Dhingra, 371 F.3d 557, 566-57 (9th Cir. 2004) (citing United States v. Hinton, 31 F.3d 817, 823 (9th Cir. 1994)).

D. Knowledge, Absence of Accident or Mistake

The Government does not intend to offer the 2005 incident to demonstrate any propensity of defendant to commit the instant offense. Rather, the Government anticipates that Defendant will place her knowledge as to the drugs in the vehicle in the instant offense at issue during trial. Defendant was the registered owner of the vehicle loaded with marijuana in December 2007, and Defendant was the registered owner of the vehicle loaded with marijuana in May 2005. Such evidence is used by the Government to rebut any argument regarding mistake, accident, or a lack of knowledge by the Defendant. Indeed, if Defendant's registered vehicle was found to have drugs in 2005, Defendant clearly was on notice about drugs "accidentally" or "mistakenly" being in her vehicle in 2007. Accordingly, the Government requests the Court to not preclude such 404(b) evidence from being presented in its case-in-chief. If the Court requires the Government not to use this evidence in its case-in-chief for any reason, the Government respectfully requests that the Court allow this evidence to be used in its rebuttal case if Defendant puts her knowledge of the December 2007 drugs at issue during her case-in-chief.

I. ADMIT DEMEANOR EVIDENCE - OR LACK THEREOF

Evidence regarding a defendant's demeanor and physical appearance is admissible as circumstantial evidence that is helpful to the jury's determination as to whether a defendant knew drugs were concealed in the vehicle. Fed.R.Evid. 701; United States v. Hursh, 217 F.3d 761 (9th Cir. 2000) (holding that a jury may consider a defendant's nervousness during questioning at Calexico port of entry); United States v. Fuentes-Cariaga, 209 F.3d 1140, 1144 (9th Cir. 2000) (holding that it is within the ordinary province of jurors to draw inferences from an undisputed fact such as a defendant's nervousness at Calexico port of entry); United States v. Barbosa, 906 F.2d 1366, 1368 (9th Cir. 1990) (holding that a jury could infer guilty knowledge from a defendant's apparent nervousness and anxiety during airport inspection); Unites States v. Lui, 941 F.2d 844, 848 n.2 (9th Cir. 1991) (holding that a jury could consider guilty knowledge from a defendant's acting disinterested during airport inspection).

Here, witnesses for the United States may properly testify to Defendant's demeanor and physical appearance, as they have personal knowledge based upon their observations of Defendant.

J. The Court Should Allow Rebuttal Expert Testimony By The Government on the Issue of Unknowing Couriers

1. Standard of Admissibility

If specialized knowledge will assist the trier-of-fact in understanding the evidence or determining a fact in issue, a qualified expert witness may provide opinion testimony on the issue in question. Fed. R. Evid. 702. The trial judge is the gatekeeper regarding the type and scope of expert testimony that should be admitted in any particular trial, and has "broad latitude" in determining the relevance and reliability of such testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 142 (1999). Determining whether expert testimony would assist the trier-of-fact in understanding the facts in issue is within the sound discretion of the trial judge. United States v. Alonso, 48 F.3d 1536, 1539 (9th Cir. 1995); United States v. Lennick, 18 F.3d 814, 821 (9th Cir. 1994). The district court may consider the Daubert test or any other factors in addressing relevant reliability concerns regarding expert testimony. Kumho, 526 U.S. at 149-50 (noting that "there are many different kinds of experts, and many different kinds of expertise," including, "experts in drug terms, handwriting analysis, criminal modus operandi").

The expert's opinion may be based on hearsay or facts not in evidence when the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703; see, e.g., United States v. Gil, 58 F.3d 1414, 1422 (9th Cir. 1995) ("We have consistently held that government agents or similar persons may testify as to the general practices of criminals to establish the defendant's modus operandi") (internal quotations omitted); see also United States v. Hankey, 203 F.3d 1160, 1168-70 (9th Cir. 2000) (affirming district court's admission of gang expert testimony that gang members would be subject to violent retribution if they testified against another gang member).

An expert may provide opinion testimony even if the testimony embraces an ultimate issue to be decided by the trier-of-fact. Fed. R. Evid. 704; United States v. Plunk, 153 F.3d 1011, 1018 (9th Cir. 1998). An experienced narcotics agent may testify in the form of an opinion even if that opinion is based in part on information from other agents familiar with the issue. United States v. Golden, 532 F.2d 1244, 1248 (9th Cir. 1976). The proposed expert testimony "alerts [the jury] to the possibility that combinations of seemingly innocuous events may indicate criminal behavior." United States v. Johnson, 735 F.2d 1200, 1202 (9th Cir. 1984).

2. Evidence Regarding Modus Operandi of Drug Couriers

The Government anticipates that Defendant's defense, if Defendant chooses to put on a case, will be that she was simply an unknowing courier. In the event that Defendant "opens the door" to the issue of unknowing couriers (be it during opening statement, cross examination, or Defendant's case-in-chief), the Government will move to present expert testimony regarding the modus operandi of drug couriers. Such testimony would be limited to the following issues: (1) that drug traffickers typically do not entrust large amounts of drugs or money to unknowing couriers; and (2) that couriers do not typically participate in the loading or unloading of narcotics. Such testimony is proper to help the jury understand the evidence in the case, to put that evidence in a relevant context and to ensure the jury does not decide the case in a vacuum. The evidence is relevant to the question whether Defendant knew of the drugs in the vehicle she drove into the United States. This is exactly the type of evidence the Ninth Circuit deemed appropriate in United States v. Murillo, 255 F.3d 1169, 1176-78 (9th Cir. 2001) and numerous other decisions.

Federal Rule of Evidence 702 allows an expert witness to testify if "specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702. However, even when expert testimony is otherwise admissible, it may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403. The street value of illegal drugs, the distribution quantities, the modus operandi of drug traffickers and the structure of drug trafficking organizations are matters that are generally beyond the common knowledge of the average lay person. United States v. Valle, 72 F.3d 210, 215 (1st Cir. 1995). Thus, expert testimony in the form of an opinion regarding these subjects is likely to help a jury. Id. Whether such expert testimony will be admissible depends on the nature of the expert testimony. The Ninth Circuit has drawn a distinction between expert testimony involving the structure of drug trafficking organizations and drug courier profiles on the one hand, and expert testimony involving the modus operandi of drug traffickers or “unknowing couriers” on the other.

With respect to expert testimony concerning the structure of drug trafficking organizations, the Ninth Circuit has held that such expert testimony is generally not relevant or admissible, except (1) when the defendant is charged with a conspiracy; or (2) when such evidence is otherwise probative of a matter properly before the trial court. See, e.g., United States v. Pineda-Torres, 287 F.3d 860, 863 (9th Cir. 2002); United States v. Vallejo, 237 F.3d 1008 (9th Cir. 2001) amended, 246 F.3d 1150 (9th Cir. 2001). (holding that expert testimony regarding structure of drug trafficking organizations was not relevant and was prejudicial where the defendant was not charged with a conspiracy to import and there was no evidence of defendant's connection to a drug trafficking organization).[1] With regard to expert testimony about drug courier profiles, the Ninth Circuit has held that is inherently prejudicial and, thus, generally not admissible. See United States v. Cordoba, 104 F.3d 225, 229-30 (9th Cir. 1997).

In contrast, "unknowing courier" expert testimony is admissible, even if a defendant's case is not complex or does not involve a conspiracy charge, as long as the "unknowing courier" expert testimony is relevant. Thus, in Murillo, where the defendant, who had been convicted for possessing the intent to distribute cocaine, challenged on relevancy grounds the admission of "unknowing courier" expert testimony during his trial, the Court in affirming the admission of the expert testimony, held that the "unknowing courier" testimony was relevant because it went to the heart of the defense that he did not know he was transporting drugs. Murillo, 255 F.3d at 1177.

Similarly, in Cordoba, the defendant, who was convicted in a non-conspiracy case of possession with intent to distribute cocaine, challenged on appeal the admission of "unknowing courier" expert testimony. Cordoba, 104 F.3d at 227, 229. In affirming the admission of such testimony, the Ninth Circuit held that "unknowing courier" expert testimony that drug traffickers do not entrust valuable cocaine to unknowing transporters was clearly probative of the defendant's knowledge that he possessed drugs and that the testimony's probative value outweighed any prejudicial effect. Id. at 229; see also United States v. Castro, 972 F.2d 1107 (9th Cir. 1992) (holding that the jury could have reasonably found that the defendant knew he possessed cocaine where "experts testified that the amount of cocaine, valued in the millions of dollars, would have never been entrusted to an unknowing dupe").

In the present case, the nature of the proposed testimony is precisely the type of testimony found to be relevant and admissible in Murillo and Cordoba. As in Murillo and Cordoba, Defendant was not charged with conspiracy and the unknowing courier expert testimony will go to the heart of the Defendant's expected defense that she did not know that over 80 pounds of marijuana was hidden in her vehicle and that it must have been placed there by persons known or unknown. Further, the Government's testimony will help the jury's understanding of the evidence and aid its determination regarding facts at issue, namely, the Defendant's knowledge and intent, and is therefore relevant. See United States v. Sanchez-Lopez, 879 F.2d 541, 555 (9th Cir. 1989) (price, quantity and quality of drugs found relevant to intent to distribute drugs and to knowledge of their presence in the car).

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[1] Notably, footnote three of the amended Vallejo opinion makes clear that, "[t]his case does *not* involve the Government's use of 'unknowing courier' testimony, in which a law enforcement official testifies that certain drug traffickers do not entrust large quantities of drugs to unknowing transporters. Therefore, we do *not* address the admissibility of such testimony." Id. (emphasis added). Thus, Vallejo is inapplicable in this case.

Indeed, Murillo simply affirmed what had been, prior to Vallejo, a well-established rule in the Ninth Circuit, as well as other circuits, that expert testimony regarding the modus operandi of a particular business is admissible even in non-complex, non-conspiracy cases provided the testimony is relevant and helpful to the jury in understanding a fact at issue. See United States v. Campos, 217 F.3d 707, 712, 719 (9th Cir. 2000) (affirming admission of expert testimony during Government's case-in-chief regarding the value of marijuana seized and the structure of drug-smuggling organizations in non-complex case in which conspiracy was not charged); Cordoba, 104 F. 3d at 229-30 (holding that "expert testimony that drug traffickers do not use unknowing transporters was clearly probative of Cordoba's knowledge that he possessed narcotics").

Evidence about the drug-trafficking business, as well as admission of evidence about the modus operandi of drug couriers, is consistent with well-established law allowing expert testimony about a criminal organization's operations as relevant to a defendant's knowledge. See Alonso, 48 F.3d at 1540 (holding that law-enforcement officers may testify regarding "typical methods and techniques employed in an area of criminal activity," and explain how defendant's conduct conforms to typical methods) (quotation omitted); Gil, 58 F.3d at 1421-22 (admitting expert testimony regarding general practice of drug traffickers); United States v. Bosch, 951 F.2d 1546, 1549-50 (9th Cir. 1991) (holding that agent with expertise in narcotics investigations may aid jury in understanding defendant's role in charged offense); United States v. Jaramillo-Suarez, 950 F.2d 1378, 1384 (9th Cir. 1991) (holding that expert properly testified regarding drug organization's use of pay-owe sheets to keep track of customers); United States v. Guzman, 849 F.2d 447, 448 (9th Cir. 1988) (admitting expert agent's testimony that switching cars is common tactic used by narcotics traffickers); United States v. Maher, 645 F.2d 780, 783 (9th Cir. 1981) (allowing expert testimony that a defendant's actions were consistent with the modus operandi of persons transporting drugs).

Given the case law above, this Court should allow expert testimony about the role and modus operandi of drug couriers. The Government does not intend to introduce drug courier evidence during its case-in-chief. However, the Government respectfully requests from this Court the right to introduce expert testimony about the modus operandi of drug trafficking organizations, testimony about so-called blind mules, and drug courier profiles, if Defendant opens the door to any of those categories of evidence during opening statement, cross-examination, or Defendant's case-in-chief. See United States v. Beltran-Rios, 878 F.2d 1208, 1212-13 (9th Cir. 1989) (testimony about type of individual used as drug "mule" admissible where defense counsel opens door). This Court should allow the requested expert testimony for the foregoing reasons and to avoid the risk that the jury may not understand how Defendant's arguably innocuous acts comport with drug smuggling.

IV

CONCLUSION

For the above stated reasons, the United States respectfully requests that its Motions in Limine be granted.

DATED: April 22, 2008

Respectfully Submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. KARLA MARICELA PALACIO SEPULVEDA, Defendant.	)	Case No. 07-CR-3394 IEG CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, STEWART M. YOUNG, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I have caused service of **GOVERNMENT'S MOTIONS IN LIMINE** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Marc Carlos, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 22, 2008

/s/ *Stewart M. Young*
STEWART M. YOUNG
Assistant U.S. Attorney